United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 19, 2003

TO : Curtis A. Wells, Regional Director
Martha Kinard, Regional Attorney
Ralph D. Gomez, Assistant to the Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: GTE/Verizon
Case 16-CA-22463

This Section 8(a)(5) case, involving the Employer's refusal to provide the Union an investigator's report made in preparation for the arbitration of a discharge grievance, was submitted for advice as to whether further proceedings are warranted where the arbitrator has ruled that the report was privileged as attorney work product and did not order the Employer to provide it. We conclude that it would not effectuate the purposes of the Act to continue to litigate the outstanding complaint, where the arbitrator has considered and denied both the information request and the discharge grievance, and where any asserted continuing need for the information is speculative.

Briefly, at an arbitration hearing in November 2003 over the discharge of an employee, the Union confirmed the existence of an investigation and report prepared by an Employer investigator. The investigation and report followed a meeting of Employer officials, including its in-house attorney, which took place after the Union filed a notice of intent to arbitrate the grievance. The Union asked for a copy of the report and, during an adjournment in the hearing, had the arbitrator serve a subpoena for the report on the Employer. The Employer refused and moved to quash on the ground of attorney work product privilege. The Union then filed the instant charge on January 7, 2003. The arbitrator stated on the record at the resumed hearing that she thought the report was work product privileged, but set a briefing schedule on the grievance, including the issue of whether the report was privileged from disclosure.

On April 4, 2003, after briefing, the arbitrator issued her ruling, finding that the report was privileged and that the Union had not shown sufficient hardship to require the Employer to produce it, and upholding the discharge. In the meantime, a Section 8(a)(5) complaint issued in this case, alleging the Employer's refusal to provide the report. Even though the arbitration is over, the Union would still like

the information, and has asserted that it could potentially ask the arbitrator to reconsider her decision or go to federal court to seek to have the arbitral decision set aside.

We conclude that it would not effectuate the purposes of the Act to continue to prosecute the outstanding information request complaint, where the issue of whether the Employer was obligated to turn the report over to the Union has already been resolved by the arbitrator[1] and the underlying grievance has also been finally resolved. Thus, and the Union's asserted potential uses for the report if it were obtained in the future after a Board resolution of the matter, in which the same privilege issue would be litigated again, are speculative. Accordingly, further proceedings on the charge would not effectuate the purposes of the Act.

B.J.K.

[1] Compare generally United Technologies Corp., 274 NLRB 504, 505 (1985)(Board would not defer to arbitration a charge involving union request for information in order to determine whether to proceed with substantive grievance, where deferral would require "two step" arbitration on the information request, and then later on the underlying grievance).